U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 31 August 2005

BALCA Case No.: 2004-INA-00077
ETA Case No.: P2003-NY-02495682

In the Matter of:

MARK MARIANI, INC.,
Employer,

on behalf of

MARVIN LUNA,
Alien.

Appearance: Earl S. David, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Mark Mariani, Inc. (hereinafter "the Employer") filed an application for labor certification[1] on behalf of Marvin Luna (hereinafter "the Alien") on April 26,

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656. This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

2001. (AF 11).[2] The Employer seeks to employ the Alien as a Landscaper. This decision is based on the record upon which the Certifying Officer (hereinafter "CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In its application, the Employer described the duties of the position as planning and executing landscaping operations, maintaining grounds, performing topiary work on trees and shrubs, planning lawns, cultivating lawns using machine and hand tools, and mowing, trimming, and cleaning grounds. The Employer required two years of experience in the job offered. (AF 11). The Employer also requested Reduction in Recruitment processing, noting that the position had been advertised and posted for the past thirty days. Copies of tear sheets and the posted notice were submitted. (AF 1-5).

In the Notice of Findings (hereinafter "NOF"), issued December 19, 2002, the CO denied the Employer's request for Reduction in Recruitment processing. (AF 14). The CO stated that the job duties included in item 13 of the ETA 750A are normally performed on a seasonal basis during warmer months. The CO stated that the Employer must document that the position is, in fact, a permanent, full-time position. The CO further stated that the Employer should document the number of years he has been in business, the number of landscapers/landscape gardeners that he had on staff in each of the last three years, the number of months each landscaper/landscape gardener worked in each of the last three years, and copies of payroll records to support these assertions. The CO noted that if the Employer assigned landscapers to different work during the cold season, the job duties listed in item 13 of the ETA 750A should be amended.

In addition, the CO found the Employer's wage offer of $15.00 per hour was below the prevailing wage of $17.36 per hour. The CO stated that this finding could be rebutted by increasing the wage offer or submission of countervailing evidence that the

[2] In this decision, "AF" is an abbreviation for Appeal File.

prevailing wage determination is in error. If the Employer chose to increase the salary offered, the Employer was directed to submit a written statement amending the application for alien employment certification and amending the ETA 750A, item 12 to reflect that change. (AF 13-15).

The Employer's rebuttal included a letter from the Employer's attorney dated October 7, 2003, in which he stated that the Employer was willing to readvertise. The Employer also submitted ETA forms with an amended item 12. In addition, the Employer submitted a letter dated October 3, 2003 from Karen Silberbauer stating that the company was established in 1990, the average number of workers is seventy per year (of which fifty are landscapers), and the landscapers are hired throughout the year. The Employer also submitted a copy of a 2001 W-3 form showing the total wages for the year. (AF 16-22).

The CO issued the Final Determination (hereinafter "FD") on November 18, 2003, denying the Employer's application for labor certification. (AF 24-25). The CO found that the Employer's rebuttal response was inadequate. The CO noted that the letter dated October 3, 2003 contained no indication of who Karen Silberbauer is. In addition, the Employer failed to submit payroll records and business income tax returns as requested. The CO stated that the W-3 was inadequate to establish that permanent, full-time, year round work can be guaranteed for the job offered. The CO also noted that while an amended version of the ETA 750A was submitted with a change made to the wage offered, the initials were illegible and no letter confirming the increase in the wage offered was submitted by the Employer. Therefore the CO concluded that it could not accept the amendment to item 12 on the ETA 750A. Based on those deficiencies, the CO denied the Employer's application for labor certification.

By letter dated December 10, 2003, the Employer requested review by this Board. (AF 63). The Employer submitted additional documentation including the quarterly New York state withholding tax forms for 2002, a sample contract for landscape work, and a copy of the 2002 W-3 form. The Employer also stated that the wage paid to the Alien of

$17.00 an hour is within 5% of the prevailing wage of $17.36. Finally, the Employer stated that Mark Mariani is a privately held company and it does not issue financial statements. (AF 63).

DISCUSSION

It is well-settled that the employer bears the burden of proof in certification applications. 20 CFR § 656.2(b); *see Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997). Here, the CO specifically instructed the Employer to "document that the position is, in fact, permanent [and] full-time." (AF 14). In response, the Employer submitted a copy of the company's W-3 for 2001, a Transmittal of Wage & Tax Statements, and a letter from Ms. Silberbauer explaining how many landscapers the Employer employs each year. The Employer failed to submit payroll records and business income tax returns as requested by the CO. Ultimately, the CO concluded that the materials submitted were "insufficient to establish that permanent full-time year round work can be guaranteed for the job offered." (AF 24). We agree.

As the CO explained, "employment" is defined as an employer's ability to guarantee permanent, full-time employment. 20 C.F.R. § 656.3. Although the regulations found at 20 C.F.R. Part 656 do not further define "permanent full-time work by the employee," the Board has held that seasonal employment, such as the position in question, "from [its] nature, may not be continuous or carried on throughout the year." *Vito Volpe Landscaping*, *et al*, 1991-INA-300 (Sept. 29, 1993) (*en banc*). In *Vito Volpe*, the Board denied permanent labor certification for an alien seeking a position as a landscape gardener, which is "traditionally tied to a season of the year," because the employer could not establish that, although its landscape gardeners worked 10 months throughout the year, the job was continuous—i.e., something other than a temporary job performed "exclusively" during the warmer months of the year.[3] *Id.* Thus, in light of the Board's decision in *Vito Volpe*, the Employer here had to sufficiently prove that it can

[3] The Board advised the employer in *Vito Volpe* that it could apply for temporary labor certification.

guarantee permanent, full-time employment—i.e., not seasonal employment—for a landscaper.

The Employer's rebuttal material, however, proved insufficient to meet the Employer's burden. The CO provided the Employer with an opportunity to submit payroll records, income tax returns, or other documentation establishing the number of months each landscaper worked each year. The CO also advised the Employer to amend its ETA forms to reflect whether it assigns its landscapers to different work during the cold seasons. The Employer provided no such documentation. Instead, the Employer submitted a letter stating that it employed 50 landscapers per year, along with an amended ETA 750A form, item 12 and W-3 forms showing the Employer's total wages for 2001. The Appeal File also contains one, unsigned "Yearly Maintenance Agreement" that was submitted along with the Employer's request for review before the Board, which provides for a one-year period of work including landscaping duties and "snow removal."[4] Because this evidence was first submitted with the request for review, it will not be considered by the Board.[5] *Cappriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992).

Moreover, the Employer failed to amend its ETA forms to reflect any cold season work performed by a landscaper as directed, and the Employer's W-3's do not establish exactly how much work its landscapers perform throughout the year. In short, none of the material submitted by the Employer establishes that it can guarantee permanent, full-time employment for the position of landscaper. If an employer's own evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

The Employer also failed to rebut 20 C.F.R. § 656.20(c)(2), which requires that all employers offer wages that are equal to or exceed the prevailing wage. The NOF

[4] It should be noted here that the Employer's description of duties on the ETA forms does not include "snow removal" or any other cold season-related duties. Indeed, the Employer did not amend item 13 of ETA 750A to reflect the cold season duties as directed by the CO in the NOF.

[5] Nevertheless, the "Yearly Maintenance Agreement" specifically states that the Employer would provide service for the month of January at a cost of $10,000, and then for each "month thereafter" at $5,000, suggesting that full-time, year round, work is not necessarily guaranteed.

specifically directed the Employer to either increase the wage offered, or submit countervailing evidence that the prevailing wage determination is in error. According to the NOF, "[i]f the salary offer is increased, employer must submit a written statement amending the application for alien employment certification and amend [ETA 750A] form, Item #12, to reflect [the] change." (AF 13). The CO also advised the Employer that "[t]he 5 percent variance as defined in [section] 656.40(2)(i) does not apply," because the occupation in question is one for which the prevailing wage determination has been made pursuant to the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq.

If the CO's request for documentation having a direct bearing on the resolution of an issue is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). The Employer amended item 12 of the ETA form to reflect the prevailing wage, but submitted no written statement as directed.[6] The Employer's failure to submit the document reasonably requested by the CO is grounds for denial of labor certification.

This application was before the CO in the posture of a request for Reduction in Recruitment. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.,* however, this panel recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless, such as, here, where the Employer failed to establish that it can guarantee permanent, full-time employment in the job offered, and there is insufficient proof

[6] By letter dated December 10, 2003 (almost one month after the Final Determination was issued), the Employer curiously explained that it "believe[s] that the wage paid to Marvin Luna of $17.00 per hour is within 5% of the prevailing wage, and is a fair wage for this position." (AF 63). Item 12 of the ETA 750A, however, includes an amended prevailing wage of $17.36, accompanied by illegible initials designed to certify the change. In any event, the letter dated December 10, 2003 was submitted in the form of a request for review. Thus, the letter does not constitute an acceptable attempt to supply a written statement to amend the application as directed by the CO in her NOF. *See Cappriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992) (holding: Evidence first submitted with the request for review will not be considered by the Board).

showing that the Employer is prepared to pay the prevailing wage. *See Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the Employer has failed to demonstrate that it can guarantee permanent, full-time employment for a landscaper under 20 C.F.R. § 656.3, or that it offers the prevailing wage as required by 20 C.F.R. § 656.20(c)(2). Accordingly, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.